Dr Mohd Ismail bin Abdul Hamid & Anor v Dr Mohd Khairy bin Yakub & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–2–7 OF 2007

MOHD YAZID MUSTAFA JC

16 MAY 2008

Civil Procedure — Injunction — Interlocutory injunction — Prohibit from proceeding with certain investigations pending final disposal of main action — Allegation that investigation shrouded in bad faith — Whether circumstances established warranting the granting of injunction

The plaintiffs in this application applied for prohibitory interlocutory injunction against the fourth defendant from proceeding with certain investigations regarding the plaintiffs pending the final disposal of the main action. The plaintiffs were medical doctors and had previously operated a medical facility known as Andalas Medical Centre in Klang ('the centre'). The centre was closed down after the fourth defendant carried out investigations regarding certain allegations of discrepancy at Andalas, inter alia, the hiring of unlicensed foreign medical practitioners and that the x-ray machines operated without proper licence. Subsequent to the closure, investigation proceeding were conducted against the plaintiffs by the fourth defendant for various allegations of medical and professional misconduct based on the two complaint letters from a former employee and a former patient of the Centre. The plaintiffs' contention was that the fourth defendant took this action in a conspiracy with the other defendants to stop them from continuing their working partnership with ITM in teaching and training student nurses studying at ITM. The fourth defendant in opposing contended that at all times, the investigation proceedings had been carried out in accordance to the usual practice for inquiry within the medical profession.

Held, allowing the prohibitory interlocutory injunction:

In the present action, there was a serious triable issue regarding the contention that there was a purported conspiracy among the defendants to remove the plaintiffs as members of the fourth defendant. The plaintiffs' professional reputation was an intangible asset and its loss could not be quantified in monetary terms. This fact coupled with the fact that the

defendant had not averred the harm or loss it would suffer if the injunction is granted resulted in the balance of convenience to favour granting of the injunction (see para 16).

[Bahasa Malaysia summary

Plaintif-plaintif dalam permohonan ini memohon injunksi interlokutori larangan terhadap defendan keempat daripada meneruskan dengan suatu penyiasatan berkenaan plaintif-plaintif sementara menunggu penyelesaian akhir tindakan utama. Plaintif-plaintif adalah doktor perubatan dan sebelum ini telah mengendalikan sebuah fasiliti perubatan dikenali sebagai Pusat Perubatan Andalas di Klang ('pusat tersebut'.) Pusat tersebut telah ditutup setelah defendan keempat menjalankan penyiasatan mengenai tuduhan kepincangan tertentu di Andalas, inter alia, pengambilan pengamal perubatan asing yang tidak berlesen dan mesin-mesin x-ray beroperasi tanpa lesen sah. Berikutan penutupan tersebut, prosiding penyiasatan dijalankan oleh defendan keempat terhadap plaintif-plaintif untuk pelbagai pertuduhan salah laku perubatan dan profesional berasaskan dua surat aduan dari bekas pekerja dan bekas pesakit pusat tersebut. Hujah plaintif-plaintif adalah defendan keempat mengambil tindakan ini secara konspirasi bersama defendan-defendan lain untuk memberhentikan mereka dari meneruskan perkongsian kerja dengan ITM dalam mengajar dan melatih pelajar kejururawatan di ITM. Defendan keempat menentang menyatakan dalam semua masa, prosiding penyiasatan telah dijalankan mengikut amalan/prosedur siasatan yang biasa untuk profesion perubatan

Diputuskan, membenarkan injunksi interlokutori larangan:

Dalam tindakan ini, terdapat isu yang boleh dibicarakan yang serius berkenaan hujahan terdapat konspirasi di kalangan defendan-defendan untuk menyingkirkan plaintif-plaintif daripada menjadi ahli defendan keempat. Reputasi profesional plaintif-plaintif adalah satu aset tak ketara dan kehilangannya tidak dapat diukur dari segi nilai kewangan. Fakta ini berserta dengan fakta bahawa defendan tidak menegaskan mudarat atau kerugian yang ia akan alami jika injunksi dibenarkan menyebabkan imbangan kesenangan memihak untuk membenarkan injunksi (lihat perenggan 16).]

Notes

For cases on interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2860–2862.

Cases referred to

American Cynamid Co v Ethicon Ltd [1975] 1 All ER 504 (refd)

A *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408 (refd)
Governors & Trustees of Lady Templer Tuberculosis Hospital Fund Registered, The v Rampai Muda Development Sdn Bhd [1987] 2 MLJ 494 (refd)
Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd [1995] 3 MLJ 293 (refd)

B *R Kamalanathan Ratnam (Vinod Kamalanathan with him) (Vinod Kamalanathan & Associates) for the plaintiffs.*
Sharon Jeyaraman (Shahrizat Rashid & Lee) for the defendants.

C **Mohd Yazid Mustafa JC:**

[1] I had, on 18 March 2008, allowed the plaintiffs' application for prohibitory interlocutory injunction against the fourth defendant from proceeding with certain investigations regarding the plaintiffs pending the D final disposal of the main action.

[2] In the main action, the plaintiffs are seeking apart from the prohibitory-interlocutory injunction, an order for general, additional and exemplary damages against the defendants for, inter alia, conspiracy to injure E the plaintiffs.

[3] The plaintiffs are medical doctors and had previously operated and were the directors of a medical facility known as Andalas Medical Centre ('Andalas') in Klang. F

[4] As at the time of my order on 18 March, 2008, there is a subsisting investigation proceeding conducted by the fourth defendant against the plaintiffs.

G **[5]** The investigation proceeding were instituted after two complaint letters dated 10 February 2001 by a former employee and 21 January 2005 by a former patient of Andalas.

H **[6]** Prior to the investigations, Andalas was closed down after the fourth defendant carried out investigations regarding certain allegations of discrepancy at Andalas, inter alia, unlicensed foreign medical practitioners and x-ray machines without usage licence. The fourth defendant made a finding that resulted in the closure of Andalas.

I **[7]** The plaintiffs' contention is that the fourth defendant took this action in a conspiracy with the other defendants to stop the plaintiffs from continuing their working partnership with ITM in teaching and training student nurses studying at ITM.

[8] The plaintiffs further contend that after Andalas was closed, the fourth defendant continued said conspiracy by refusing to issue the plaintiffs' annual practicing certificate and the second plaintiff's certificate of good behaviour required to enable her to study abroad for her specialist course and lastly the pending investigation proceedings against the plaintiffs.

[9] The plaintiffs also contend that the investigation proceedings are shrouded in bad faith because the notification dated 6 August 2005 was intentionally sent to Andalas when the fourth defendant had knowledge that Andalas was no longer in operation. Further, that by reason of said action, the plaintiffs had inadequate time to attend the proceedings and to prepare for the same.

[10] The fourth defendant, in opposition has denied all the plaintiffs' contentions. The fourth defendant contends that at all times, the investigation proceedings have been carried out in accordance to the usual practice for inquiry within the medical profession.

THE GENERAL LAW

[11] The general principles applicable in any application for an interlocutory injunction have been discussed at length in the classic case of *American Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504, 509 where Lord Diplock stated that:

> ... When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on the contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at the time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action... The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he would not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience lies.

[12] And at pp 510–511:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed

A argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing'. So, unless the material B available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

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[13] The local position mirrors the above principle enumerated by Lord Diplock in numerous decisions, one of which is *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408 at p 409 where it was held by the Supreme Court (the quorum of Hashim Yeop A Sani CJ Malaya, D Mohamed Yusoff and Gunn Chit Tuan SCJJ (as they then were) that:

> Many factors can be relevant for consideration at this stage. It is implied in *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 42 that any factor which can tip the balance may be considered and this is referred to at p 42: Firstly E to discover whether the plaintiff's case is frivolous or vexatious, if it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits. But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because F in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of 'preventing irreparable damage. As Lindley LJ said in*London & Blackwell RIy Co v Cross* (1886) 31 Ch D 354 at p 369: The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.

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SERIOUS TRIABLE ISSUE

[14] The plaintiffs are medical doctors and as to date, their medical centre H has been closed down on direction of the fourth defendant.

[15] At present there is a pending investigation proceeding conducted by the fourth defendant against the plaintiffs for various allegations of medical and professional misconduct based on two complaint letters from a former I patient and a former employee.

[16] I find that there is a serious triable issue regarding the contention that there is a purported conspiracy among the defendants to remove the plaintiffs as members of the fourth defendant.

[17] In effect, the plaintiffs' contention is that the fourth defendant's actions in directing the closure of the plaintiffs' medical centre, refusing to issue the certificate of good standing for the second plaintiff and conducting the investigations and inquiry on the plaintiffs, inter alia, amounts to an attempt to estop the plaintiffs from practicing as medical professionals.

[18] From a reading of the affidavit evidence, I find that this contention would require determination by examination of witnesses.

[19] The fourth defendant's affidavit in reply (encl 19) in essence is a bare denial.

[20] Apart from averring that the investigations carried out on the plaintiffs are in accordance with the normal procedures, the fourth defendant has not averred anything substantive in defence.

[21] Furthermore, at para 38 of encl 19, the fourth defendant admitted that the letter dated 6 August 2005 ie, the notice to attend the investigations was wrongly posted to the closed down.

[22] This implies some truth to the plaintiffs' contention of inadequate notification to attend the investigation proceedings.

ADEQUACY OF DAMAGES

[23] As for whether damages could adequately compensate the plaintiffs if the injunction is not granted, I find this to be in the negative.

[24] Professional reputation is an intangible asset and its loss could not be quantified in monetary terms.

[25] I would refer to the case of *Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 MLJ 293 at p 818 where the Court of Appeal held:

> Looking at the facts of the present case, it seems clear to me that as the learned judge himself has rightly held that there are serious issues to be tried and there is clear and unrefuted evidence of actual ongoing negotiations to dispose off the said property to other potential buyers, the balance of convenience and of justice must be in favour of maintaining the status quo. Land being valuable and special commodity, once lost, may not adequately be compensated by damages.

[26] I would also refer to the case of *The Governors & Trustees of Lady Templer Tuberculosis Hospital Fund Registered v Rampai Muda Development Sdn Bhd* [1987] 2 MLJ 494 where LC Vohrah J (as he then was) stated at p 500:

> As the trust corporation is not a profit-making body and as its main concern is that the hospital should function as a viable hospital, the loss or harm to the trust corporation. I do not think, can be measured in monetary terms.

[27] Similarly in the present action, the loss or harm to the plaintiffs' professional reputation cannot be measured in monetary terms.

BALANCE OF CONVENIENCE

[28] This fact coupled with the fact that the defendant has not averred the harm or loss it would suffer if the injunction is granted results in the balance of convenience to favour granting of the injunction.

[29] I come to this finding based on Lord Diplock's decision in *American Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504 at p 509 regarding the governing principle for determining the balance of convenience. The learned judge stated:

> ... the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If; on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.

[30] Based on the above reasons, I allowed the prohibitory interlocutory injunction. A

Application allowed.

Reported by Ashgar Ali Ali Mohamed B

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